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In the

SUPREME COURT OF THE UNITED STATES

H. Richard Austin,
Petitioner

vs.

Hanover Insurance Company &
Massachusetts Bay Insurance Company,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

What "fraud" (referred to in *Commissioner v. Sunnen* 333 US 591, 597, 92 L.Ed. 898, 906 (1948) bars enforcement of the doctrine of "res judicata" so an unconscionable judgment obtained through fraud can be vacated?

Don't the following constitute either fraud against a party or the court or against both and hence provide grounds for an independent action pursuant to FRCP 60 b ("savings clause") -- A longstanding "scheme" that involves a party (insurer), attornies (officers of the court), experts and others, who conspire to produce falsified evidence. A key component of the scheme utilizes the attornies on a continuing basis to undermine the judicial process so the fraudulent evidence cannot be uncovered. The actions of the attornies include among others: hiding an essential witness so he cannot be questioned regarding the fraud; producing a forged document and other socalled evidence related to the fraud after discovery is terminated so discovery rights and court directives can be nullified; deliberately misrepresenting in signed papers and exchanges with the court the evidence known by the attorney to be fraudulent; conspiring with the experts to invent additional evidence to support the original, falsified evidence; and also assisting the witnesses to perjure themselves in order to deceive court and jury regarding the fraudulent scheme in its various aspects and thereby obtain an unconscionable judgment?

Can the underlying complaint of an independent action, that pleads in detail (FRCP 9(b)) with supporting documentation the above premeditated activities and others thusly tainted by fraud, be dismissed on the grounds of res judicata and even be considered frivolous?

TABLE OF CONTENTS

Page

OPINIONS BELOW..... 1

JURISDICTION.....1

STATEMENT OF THE CASE.....1

A) Introduction.....1
B) Litigation.....2
C) Independent Action and Dismissal.....4

REASONS FOR GRANTING THE WRIT

1. Hanover Employed Systemactic Fraud In Order Falsely to Prove the Cause of the Housefire - the Indispensable Element of their Defense.....6

A) Insurer's Burden of Proof.....6
B) Fraudulent Lab Tests and Expert's Contrived Report.....7
C) Revealing Trial Testimony From Concealed Witness.....9
D) Knowledge of Accidental Causation.....11

2. Hanover Engaged in an Ongoing Effort to Undermine the Judicial Process so its Fraud Wouldn't be Discovered Before Trial 11

A) Thwarting Discovery 11
B) Fabricating Additional Falsified Evidence..... 13

3. The Applicable Legal Standards Pertaining to Independent Actions and Pleadings Do Not Support Dismissal..... 14

A) Opinion of the Second Circuit..... 14
B) Dismissal under FRCP 12(b)(6)..... 16
C) Res Judicata..... 16
D) Independent Actions (FRCP 60b)..... 17

CONCLUSION..... 19

TABLE OF CITED AUTHORITIES

Page

Cases - Federal

Albiero v. City of Kankakee
122 F.3d 417 (7th Cir. '97).....16

Aoude v. Mobil Oil Corp.
892 F.2d 1115 (1st Cir. '89).....18

Bankers Mortgage Company v. United States
423 F.2d 73 (5th Cir. '70).....17

Bernheim v. Liff
79 F.3d 318 (2d. Cir. "96).....16

Commissioner v. Sunnen
333 US 591, 92 L.Ed. 898 (1947) (1948).....i, 14, 17

Conley v. Gibson
355 US 41, 2 L.Ed. 2d 80 (1957).....16

Daubert v. Merrell Dow
509 US 579, 125 L.Ed.2d 469 (1993).....7

Federated Department Stores, Inc. v. Moitie
452 US 394, 69 L.Ed. 2d 103 (1981).....17

George P. Reintjes Co. v. Riley Stoker Corporation
71 F.3d 44 (1st Cir. '95).....18

Gleason v. Jandrucko
860 F.2d 556 (2d.Cir. '88).....18

Grandon v. Merrill Lynch
147 F.3d 184 (2d.Cir. '98).....16

Hackford v. Babbit
14 F.3d 1457 (10th Cir.'74).....16

Hazel-Atlas Glass Co. v. Hartford-Empire Co.
322 U.S. 238 (1943), 88 L.Ed. 1250 (1944)..... 18

Herendeen v. Champion International Corporation
525 F.2d 130 (2d.Cir. '75).....17

I.A. Durbin, Inc. v. Jefferson National Bank
793 F.2d 1541 (11th Cir. '86).....17

In Re Intermagnetics of America
926 F.2d 912 (9th. Cir. '91).....19

Interoceanica Corporation v. Sound Pilots, Inc.
107 F.3d 86 (2d. Cir '97).....17

In Neitzke v. Williams
490 US 319, 104 L.Ed.2 351 (1989).....15

In Re Teltronics Services, Inc.
762 F.2d 185 (2d.Cir. '85).....14

Livingston v. Adirondack Beverage Company
141 F.3d 434 ((2d. Cir.'98).....15

M.W. Zack Metal v. International Navigation Corporation
675 F.2d 525 (2d. Cir. '82).....15

Marshall v. Holmes
141 US 589, 35 L.Ed. 870 (1891).....5, 17

National Surety Co. v.. State Bank of Humbolt
120 F. 593 (8th Cir. '03).....17

Pilay v. INS
45 .3d 14 (2d.Cir. '95).....15

U.S. v. Beggerly
524 US 38, 141 L.Ed. 2d 32 (1998).....21

United States v. United States Fidelity Guaranty Co.
309 US 506, 84 L.Ed. 894 (1940).....16

Watts v. Pinckney
752 F.2d 406 (9th Cir. '85).....16

Weese v. Schukman
98 F.3d 542 (10th Cir. '96).....19

Warth v. Seldin
422 US 490, 45 L.Ed. 2d 343 (1975).....16

Cases - State

Westchester Fire Insurance Company v. Deuso
146 Vt. 424, 505 A.2d 666 ('85).....6, 21

Statutes

28 USCS 1254 1

28 USCS 1332 2

FRCP 9b 1

FRCP 60b 4, 17, 20, 21

OPINIONS BELOW

The District of Vermont dismissed Petitioner Austin's independent action on the grounds of res judicata on November 3, 1999. (Appendix A). The Court of Appeals for the Second Circuit issued its order affirming the dismissal on May 4, 2000. (Appendix B). A Petition for a Panel Rehearing was denied on July 6, 2000. (Appendix C).

JURISDICTION

Federal jurisdiction of this long-standing insurance contract dispute is based on diversity of citizenship and the amount in controversy (28 USCS 1332). The Petition for a Writ of Certiorari comes before the U.S. Supreme Court pursuant to 28 USCS 1254.

STATEMENT OF THE CASE

A) Introduction

This Petition concerns the erroneous dismissal of an independent action (FRCP 60b - savings clause) that seeks to vacate a judgment obtained by an insurance company through fraud. The dismissal is contrary to the clear and convincing evidence presented in the underlying complaint as well as established legal practise pertaining to independent actions and the sufficiency of pleadings.

The complaint describes in detail (FRCP 9b) the long-standing, fraudulent scheme employed by Respondents to manufacture false, "scientific" evidence in connection with a housefire so the applicable homeowners policy could be voided unlawfully. During six years of prior litigation, Respondents (hereafter Hanover) have produced nothing that disproves the fact that with premeditation they perpetrated this elaborate fraud

directed at both Petitioner (hereafter Austin) and the District Court of Vermont. The scheme involves the participation of a significant number of professionals in several states, including attornies (officers of the court), experts, a forensic laboratory and others. A key element of the scheme has been the ongoing effort by the attornies to manipulate improperly the legal proceedings so the scheme could be protected from detection and also enhanced as the litigation proceeded. Thus "fraud upon the court" is clearly present here. Because of the manner in which Hanover and its attornies improperly disadvantaged Petitioner Austin, it wasn't possible during the original proceedings to deal with such an organized effort to undermine the judicial process.

As demonstrated by the complaint and the evidence attached to it (principally Hanover's own documents and the deposition and trial testimony of their witnesses), it can now be concluded without reasonable doubt that **only a few days after the fire, Hanover deliberately set in motion an elaborate scheme intended to manufacture spurious, "scientific" evidence that would make the subject fire appear to be intentionally set**. In addition, it can alse be concluded that at the time the scheme was initiated, the insurers possessed information indicating that the subject fire was in fact accidental. (complaint - section 13).

B) Litigation

The fire that destroyed Austin's home in Warren, Vermont occurred on November 12, 1993. Insurance coverage of the dwelling and contents was provided by a fully paid homeowners' policy (HVV #2442889) issued by the Hanover Insurance Company and its subsidiary Massachusetts Bay Insurance Company. Coverage commenced in 1986, and there were no prior claims. The amounts of applicable coverage were determined by the insurers and their agent, and total coverage approximately equalled the loss, including the amount needed for reconstruction. A few weeks after the fire, Austin informed Hanover that his purpose for

filing the claim was to rebuild his house. He fulfilled all requisite conditions for indemnification, including the Proofs of Loss, which define the financial paraments of the claim and were accepted by Hanover as fair and accurate. (Contractural damages are thus liquidated.) Nonetheless, the claim was rejected, and the insurers went to trial alleging intentional burning and fraud. However, since the trial it has gradually become clear that Hanover falsely invoked such grounds while its defense was in fact built upon a fraudulent scheme that was set in motion long before any dispute arose between the parties.

The litigation commenced with a lawsuit that was filed on August 16, 1994 in the state court of Saint Louis County, where Austin went to live after the fire. Hanover removed the case to Federal court (E.D. Missouri) and obtained a change of venue to Vermont. In the moving papers submitted by attorney Russell Watters of Brown and James, St. Louis, particular emphasis is given to the importance of protecting alleged physical evidence (samples) that has turned out to be a fraud.

The judgment adverse to Austin was entered on August 1, 1997 after a jury trial. No post-trial motions of any sort were filed, and instead Austin appealed to the Second Circuit Court of Appeals. The opinion of the Second Circuit was rendered on November 12, 1998, or almost 15 months after the trial, rejecting the various issues (eight) raised in the appeal that concern harmful error of various sorts that occurred in the trial court. A Petition for Rehearing was also rejected on January 14, 1999. The issues of the appeal did not include Hanover's fraud, which has only come to light gradually since the trial. In his appeal brief to the Second Circuit, Austin mentioned the possibility that Hanover, its attornies and experts might have perpetrated an evidentiary fraud in the trial court; however, he did not yet have sufficient information at his disposal to reach a definitive conclusion about such a serious matter. Shortly after the appeal was rejected by the Second Circuit, however, he was able to conclude definitively that a serious fraud

was in fact present here. Since it was too late to file a motion adressing the subject in the trial court (FRCP 60 b(3)), Austin continued to pursue what he reasonably considered a valid appeal with a Petition for a Writ of Certiorari to the U.S. Supreme Court. The Petition was denied on June 14, 1999.

C) Independent Action and Dismissal

Having no remedy under the law, Austin resorted to an independent action pursuant to the savings clause of FRCP 60b (which allows fraudulent judgments to be challenged after the one-year time limit for motions). The complaint was docketed on September 2, 1999 in the District of Vermont (1:99-CV-252), where the original action (2:95-CV-170) was heard. Hanover submitted a motion to dismiss on the grounds of res judicata, which was granted on November 3, 1999. However, the motion contains no facts demonstrating that Hanover did not perpetrate such a serious fraud against Austin as well as the court. Instead, the terse motion merely contains deceptive statements and asserts inaccurately that the only available grounds for relief is through a motion submitted within a one-year period that had expired. The one-year time limit for a motion, however, applies only to ordinary fraud and not the two kinds that are pleaded and are recognized as grounds for an independent action such as Austin's.

In addition, Hanover's motion to dismiss deliberately misrepresents key facts. Thus it states falsely that the subject matter of the complaint had been fully adjudicated during trial and also that Austin submitted certain post-trial motions (plural) on the subject, the substance of which was rejected by the trial court, Court of Appeals and the Supreme Court.

> The sole jurisdictional basis for Austin's independent action is FRCP 60(b)(1)&(3), which respectively permit motions for relief from judgment on the basis of 'mistake, inadvertence, surprise, or excusable neglect" or for "fraud'....Furthermore, the most cursory review of the Amended Petition reveals that

that Mr. Austin is again continuing to argue -- as he unsuccessfully claimed during trial, in his post trial motions, on appeals to the Second Circuit, and in his certiorari petition to the United States Supreme Court -- that the Mercury Research laboratory test results were fabricated evidence. The jury rejected this claim and that rejection has been affirmed by all reviewing courts..."

The obvious purpose of this latest deception by Hanover is, of course, to give the misleading impression that the fraud issue was previously disposed of and therefore cannot form the basis of an independent action. This is completely untrue. For various reasons including the fact that he was prevented from completing the deposition of an essential witness (Jimmy Pau), Austin couldn't be sure at the time of the trial whether the lab tests were fraudulent or not. Afterwards, no post-trial motions were submitted, including any addressing the fraud issue. Although in his response to Hanover's motion to dismiss the independent action, Austin drew these and other relevant facts to the attention of the district court, the motion was granted nonetheless. Thus Hanover once again managed to perpetuate its long-standing scheme with one more fraudulent submission added to so many others. Hanover's current attorney of record (Clayton), who has played such a pivotal role in the insurer's scheme, did not sign the spurious motion to dismiss. Instead another attorney from the same firm interposed his own signature. Apparently, Attorney Clayton is finally becoming aware of the significance of his signature on so many fraudulent documents submitted to federal courts.

The appeal contesting the dismissal, including the record, was docketed in the Second Circuit on November 17, 1999 (99-9375). Subsequently Austin submitted a motion seeking reduction of an appeal bond in the amount of $10,000. This unusually large bond had been granted by the District of Vermont after the appeal was allowed to proceed, and more than two weeks after the case file was transferred and the appeal docketed in the Second Circuit.

The bond, however, bears no relationship to any allowable, potential costs that Hanover might have incurred during the appellate process. After the prior appeal to the Second Circuit (97-9069) the costs awarded amounted to only $92.40. Such a large bond acts as an unfair obstacle to an appeal; places an excessive price on what amounts to a legal right; and violates the recognized standards pursuant to FRAP 7 and FRAP 39. Austin did not post the bond and instead submitted the motion seeking its reduction to a more reasonable amount. In turn, Hanover entered another motion to dismiss because the bond had not been posted.

In response, the Second Circuit disregarded the subject of the bond and instead on its own initiative dismissed the appeal as "frivolous" on the grounds of res judicata (May 4, 2000). However, no briefs or argument of any kind contesting the issue were submitted. Nonetheless, the appellate court took the drastic step of terminating this valid cause of action. Austin submitted a Petition for a Rehearing in the attempt to acquaint the court with the substantial, factual grounds that support his independent action. However, this Petition was also rejected.

REASONS FOR GRANTING THE WRIT

1. Hanover Employed Systematic Fraud In Order Falsely to prove the Cause of the Housefire - the Indispensable Element of its Defense.

A) Insurer's Burden of Proof

According to the substantive law of Vermont and most states, the threshold issue (sine qua non) of the socalled arson defense is proof that a fire was in fact deliberately set. *Westchester Fire Insurance Company v. Deuso* 146 Vt. 424, 505 A.2d 666, '85. The supporting cases that are cited from across the country indicate that any circumstantial evidence employed in this regard must be very strong and virtually indisputable. To meet such a

burden, the opinion of experts in the field of fire investigation is often used. Almost the entire trial (July 28 - August 1, 1997) was preoccupied with the issue of fire causation. In this connection Hanover utilized five, expert witnesses. Federal evidentiary standards control the admissability of such expert opinion, principally *Daubert v. Merrill Dow* 509 US 579, 125 L.Ed. 2d 469 (1993) with its emphasis on objective, scientific methodology. However, **Hanover's scheme was intended to render such legal standards (state and Federal) a virtual nullity**, thus enabling the insurer to prove anything about the fire that might serve its interests. The prompt, almost routine way the scheme was set in motion strongly suggests that the individuals involved had long experience in this type of activity. It was probably carelessness born of over-confidence that ultimately led to the scheme being uncovered. When the Supreme Court promulgated its landmark decision in *Daubert,* it is doubtful that the court could have imagined that a company that insures private homes across the country would attempt to turn Daubert's requirements into what amounts to window-dressing to be fabricated as needed to mislead court and jury and justify denial of legitimate claims.

B) Fraudulent Lab Tests and Expert's Contrived Report

There were two investigations of the firesite - police and insurers. Both were conducted pursuant to voluntary releases provided by Austin, who sought all possible assistance in determining the fire's cause prior to reconstruction. The investigation by the police took place on November 15 and 16 and involved a dog that detects petroleum-based substances. On both days, the dog reacted a number of times outside the structure and inside (principally the recreation room, which was the former garage). Tests at the New York State Crime Lab were all negative, and it has never been determined what the dog might have detected. Hanover's investigation of the site was conducted by Mr. George Wilson, a fire investigator employed by Douglas G. Peterson & Associates, Greenfield, Massachusetts. Wilson was present at the

site on November 16 and also worked there by himself on November 24. On that day he examined the adjacent boiler/laundry rooms (the only area not examined by the dog). In exchange for permission allowing Wilson to continue working there, Hanover promised to share his findings. Hence Austin did not have his own investigator. The promise to share the information was never implemented.

George Wilson's "Scene Examination Report" purports to be his scientific analysis of the firesite based on his long experience and training. On its face it appears to be a very professional document. Wilson concluded that the subject fire was incendiary, and in support of this conclusion, the report on its final page (complaint, Attachment No. 1) cites various, alleged evidence that demonstrates an accelerant was poured on the ground floor level of the house. The principal, supporting evidence is two, lab tests that supposedly identified the accelerant found at two locations in the laundry room. The tests were conducted on a Hewlett Packard gas chromatograph /mass spectrometer (GC/MS) at the Mercury Research Lab in Cary, North Carolina. What Hanover and its experts, including Wilson, have never disclosed, however, is that the tests are fraudulent and were prearranged before Wilson returned to the site on November 24. Essentially **fire investigator George Wilson went back there for the sole purpose of fabricating a supposedly "scientific" report that would utilize the falsified tests. At this point, the facts that have become available demonstrate that there is no reasonable doubt that both the tests and the report are a deliberate, evidentiary fraud.**

The two, allegedly positive tests (samples #4 and #6) are dated respectively November 25, 1993, 2:32 am (sample #4) and November 25, 1993, 4:00 am (sample #6). (complaint - Attachments Nos. 2,3). Such a date/time is generated automatically by the GC/MS at the inception of a test and encrypted along with the rest of the data in binary code (computer language). It cannot be

altered later without destroying significant portions of the test file. The date/time is produced by an internal clock that continues to run automatically even when the computer is turned off because it is supported by a CMOS battery. These batteries are extremely reliable and long-lasting. In the unlikely event that one failed, any date/time would be lost along with the computer's BIOS (basic in/out system or operational instructions). Hence the computer would not be able to function correctly. (complaint - Sections 10,11).

The two positive samples were among eight allegedly gathered by Wilson on the afternoon of November 24. After spending most of the day at the site, he had to drive back to the offices of Douglas G. Peterson & Associates in Greenfield, Massachusetts (about five hours), sort and package the samples and ship them to Cary, North Carolina, which is about one-thousand miles away. After reaching the lab, they had to be unpacked and undergo extensive preparation. This step alone is an overnight process. All of this, including transport over such a long distance, would have had to take place in a relatively few hours so the tests could be performed in the early morning of November 25. Obviously this is impossible. As noted, Hanover and its experts have been unable to provide a scientifically plausible explanation for the date/time discrepancy. Instead on the sworn record they have made only overtly false statements on the subject that contradict basic, scientific facts regarding the design of a GC/MS as well as the lab's own written documents.

C) Revealing Trial Testimony From Concealed Witness

At the trial Jimmy Pau, technical director of the lab, testified falsely with the assistance of Attorney Gregory Clayton in order to deceive the jury about the tests and their lack of authenticity. (complaint - section 9, attachment 4). According to Pau, the samples did not reach the lab until November 30 and the tests conducted on December 1. He attempted to explain the date/time discrepancy by alleging that the computer in the GC/MS had been

turned off for six days because of electrical problems in the Cary, North Carolina area. Allegedly this stopped the inter al clock that generates the date/time. Thus, when the computer was turned back on so the tests could be conducted, there was the discrepancy of six days. As Pau stated falsely under oath: "You have to set the date and the time... after you turn it off, you have to reset it... **you need to reset the clock <u>every time</u> you run that**." This explanation is obviously false and contradicts the way the clock in a GC/MS' computer functions, including the fact there is a battery (a source of reserve power) connected to the clock. Since there is this reserve source of power, it isn't necessary every time to reset the clock which continues to run on its own.

Furthermore, Pau testified that when the two tests took place, lab personnel didn't notice that the computer generated an erroneous date/time six days before the date when the tests were supposedly performed. In that regard, it should be noted that an electronic clock in a GC/MS is not like a mechanical clock that continues to display the time when it stopped running. With such an electronic clock, any date would be lost along with the computer's operational instructions (BIOS) if the source of power ever stopped and hence the clock. It would, of course, be impossible not to notice such a situation when the computer was restarted..

Equally revealing is the fact that **Pau's pivotal testimony is disproven by the lab's own written correspondence relating to the two tests** (complaint - attachments 6.7). In these documents reference is made to the lab's quality assurance program that calibrates the GC/MS so it can perform properly. This program was at that time conducted on a daily basis and therefore incorporated into the analytical procedure for the tests. As stated: "The QA program consists of a <u>daily auto-tune</u> of the mass spectrometer and a standard calibration run on the GC/MS system." (underlining added). Since this "auto-tune" program was conducted each day, the computer that controls the GC/MS could not have been turned off for six, straight days. Based only on this written evidence from

the lab itself, there is no other possibility except that Pau's explanation of the date-time discrepancy is deliberately false and the tests a fraud.

D) Knowledge of Accidental Causation

The events surrounding the falsified tests demonstrate a knowledge by Hanover, Wilson and other participants in the scheme that the fire was accidental. (complaint - Section No. 13). Since the tests were already arranged before Wilson returned to the site, it must have been concluded that there was no need to wait and test any additional samples he acquired on November 24. Otherwise, before going to all the trouble of setting up the phoney tests, they would have waited for Wilson to review the important areas of the house not previously examined. When the earlier work was done at the site on November 15 and 16 (when the dog was there), Wilson, and perhaps others, must have detected something that indicated the fire was accidental. Austin continues to believe that the woodstove overheated, causing a serious chimney fire - something that happened previously causing internal damage to both banks of chimney flues. Unfortunately the woodstove that weighed over 500 pounds and was essentially useless mysteriously disappeared from the site and has never been found.

The date/time discrepancy was the result of an unanticipated change in Wilson's schedule. Originally he returned to the firesite on November 22. However, Austin would not allow him to proceed without assurances that the results of his work would be shared. Hence he had to come back on the 24, causing the revealing discrepancy which ultimately resulted in the fraud becoming known.

2) Hanover Engaged In An Ongoing Effort to Undermine the Judicial Process so its Fraud Wouldn't Be Discovered Before Trial.

A) Thwarting Discovery

After the litigation commenced in August 1994, Hanover

and its attornies Harold Eaton of Eaton and Hayes, Woodstock, Vermont and later Attorney Gregory Clayton, Downs, Rachlin and Martin, Burlington, Vermont embarked on a continuing effort to conceal and also enhance the fraudulent scheme. Among others, their various deceptive actions include submitting false, signed documents based on the fraudulent evidence; perverting the normal process of discovery so the true nature of the fraudulent evidence could not be comprehended; and generating additional, phoney evidence intended to enhance the original, falsified evidence. The purpose of these and other illegal actions was at all times to manipulate the judicial process so it could not function correctly.

Thus, during the discovery period, the attornies did everything possible to prevent Austin from uncovering the fraud being perpetrated against him as well as the court. They succeeded. Discovery, which commenced on August 1, 1995, lasted 14 months and was never completed. During that entire period, Hanover never willingly complied with any discovery request until a motion of some kind was before the court. Hanover would not even produce their experts for deposition. Afterwards, neither fire investigator Wilson or Jimmy Pau would sign their depositions, and Pau abruptly disappeared "somewhere abroad" for several months so his deposition could not be completed. When Austin contacted lab personnel trying to ascertain where Pau was located, Attorney Clayton threatened sanctions, making clear his determination to prevent further contact with this important, material witness (complaint - Sections 19). Since Pau did not reappear until discovery was closed, Austin was never able to finish questioning him about the date/time discrepancy.

After Pau finally resurfaced, he cooperated with Attorney Clayton to produce a forged document falsely attributed to the prestigious American Society of Testing and Materials. The immediate purpose was to nullify a written court order regarding the information promised at Pau's deposition (complaint - section 20). However, this spurious document was only produced after

discovery was terminated so Pau could not be questioned about this subject as well. Thus **in the continuing effort to protect the scheme, Hanover and its surrogates went as far as engaging in forgery regarding one of the most important, scientific organizations in the country.**

B) Fabricating Additional, Falsified Evidence

Attorney Clayton proceeded next to conspire with the experts to produce additional, fraudulent evidence that was intended to give the renewed appearance of legitimacy to the falsified tests (complaint - sections 22-27). This involved the active participation of Stephen Houghton, director of fire investigation services at Douglas G. Peterson & Associates, who suddenly produced a liquid sample that was allegedly taken from the underground fuel tank at the site. Another test was performed at the Mercury lab, and not suprisingly, it supposedly established that the accelerant that was never found in the first place came from the tank. With this additional, socalled evidence in hand, Attorney Clayton was emboldened to generate even more fraudulent evidence in the continuing effort to obscure the date/time discrepancy and reinstate the credibility of the original, falsified tests. In this regard a spurious piece of evidence suddenly made its appearance just as the case was placed on the trial calender. It consisted of some sort of paper in a can partially filled with fuel oil. The item was produced by Officer David Harrington of the Vermont State Police more than three and one-half years after the fire. He did so in spite of the fact that during his deposition in August 1966 neither he or Attorney Clayton disclosed the existence of this alleged evidence in response to repeated questions from Austin concerning relevant "physical" items of any kind in the possession of the Vermont State Police (complaint - section 24). At the pretrial conference, Attorney Clayton in a direct verbal exchange with the court deliberately misrepresented the timing when Austin was finally informed about the substance in the can (complaint - section 26). He did so, of course, to gain admission of

this spurious evidence produced more than a half-year after discovery was terminated so this latest addition to the scheme also could not be scrutinized effectively.

Allegedly the item that appeared so suddenly was the newspaper (copy of the Wall Street Journal) that was found after the fire on Austin's front lawn near a stump he was cutting up with a chainsaw. The real newspaper had actually been there for about a month. At the trial Austin saw the item for the first time, which was definitely not what had been on his lawn. Someone had stuffed a wad of paper in a gallon can of foul-smelling oil, which ultimately ended up in the jury room. The purpose, of course, was to convince the jury that something totally unrelated to the fire was closely involved in its cause. The smell coming from the can would have pervaded the room and produced a very misleading impression in the minds of a lay jury already prejudiced by days of deliberately false "expert" testimony cleverly orchestrated by Attorney Clayton. In all, four experts (Pau, Wilson, Houghton and Harrington) willingly perjured themselves regarding various aspects of Hanover's fraudulent evidence in order to legitimatize it in the eyes of a jury with little or no knowledge of fire investigation.

3) The Applicable Legal Standards Pertaining to Independent Actions and Pleadings Do Not Support Dismissal.

A) Opinion of the Second Circuit

Two precedents are cited in the appellate court's opinion as grounds for the dismissal of this well-supported independent action. *In Re Teltronics Services, Inc.*, 762 F.2d 185 (2d. Cir. '85) reviews the issue of "res judicata" and at 190 cites *Commissioner v. Sunnen,*, 333 US 591, 597, 92 L.Ed. 898 (1948). In the section quoted, Justice William O. Douglas states:

> "The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment." (underling added).

Additionally, the Second Circuit relies on *Pillay v. INS* 45 F.3d 14, 16-17 (2d. Cir. '95), which discusses the concept of frivolousness, citing *In Neitzke v. Williams*, 490 US 319, 325, 104 L.Ed. 2d 338, 347 (1989). Therein, the Supreme Court states: "...a complaint... is frivolous where it lacks an arguable basis either in law or in fact... frivolous, when applied to a complaint, embraces not only the inarguable legal conclusion, but also the fanciful factual allegation." This statement is mirrored in a recent Second Circuit opinion, *Livingston v. Adirondack Beverage Company,* 141 F.3d 434, 437 (2d. Cir. '98): "An action is frivolous when either 1) the factual contentions are clearly baseless as when allegations are the product of delusion or fantasy, or 2) the claim is based on an indisputably meritless theory."

Thus while recognizing that fraud blocks the enforcement of res judicata, the Second Circuit nonetheless concluded incorrectly that Austin's independent action not only lacks an arguable legal basis but in effect amounts to a delusion on his part. As emphasized repeatedly in this Petition, the compelling facts in the complaint detailing Hanover's fraud are supported by very strong documentary evidence and have never been refuted by Hanover. This includes the successful motion to dismiss.

Furthermore, the senior judge of the panel that dismissed the action acted contrary to a well-known Second Circuit legal opinion that he personally authored on the subject of independent actions - *M.W. Zack Metal v. International Navigation Corporation* (675 F.2d. 525 (2d. Cir. '82). The essence of the opinion is contained in the following statement at 529: "An independent action for fraud may not be entertained if there was an opportunity to have the ground now relied upon to set aside the judgment fully litigated in the original action." Cites *Marshall v. Holmes* 141 U.S. 589, 596, 35 L.Ed. 870, 873 (1891).

B) Dismissal under FRCP 12 (b)(6)

According to established practise regarding this Rule, a complaint should not be dismissed unless it "appears to a certainty that a plaintiff can prove no set of facts entitling him to relief." (underlinding added). *Grandon v. Merrill Lynch* 147 F.3d 184, 188 (2d. '98); "appears beyond doubt.." *Bernheim v. Liff* 79 F.3d 318, 321 (2d. Cir. '96). Also a complaint may not be dismissed unless "it is impossible to prevail under any set of facts that could be proved consistent with the allegations." (underling added). *Albiero v. City of Kankakee* 122 F.3d 417 (7th Cir.'97). *Conley v. Gibson* 355 US 41, 2 L.Ed. 2d 80, 84 (1957).

In reviewing a dismissal, an appellate court must accept as true the factual allegations made in a complaint and "draw all inferences in favor of the plaintiff." *Grandon* at 188; *Berheim* at 321. "...construes all reasonable allegations in the light most favorable to the plaintiff." *Hackford v. Babbit* 14 F.3d 1457, 1465 (10th Cir.'74). *Warth v. Seldin* 422 US 490, 45 L.Ed. 2d 343, 356 (1975)

Finally, a party filing a motion under FRCP 12(b) "must include all defenses and objections then available to him that Rule 12 permits". *Simpkins v. District of Columbia Goverment* 108 F 3d. 366, 368 (D.C. Cir. '97). However, Hanover's motion contains only deliberate misrepresentations and no factual information disproving the fact the insurer perpetrated such a fraudulent scheme. Therefore the motion itself is grossly fraudulent and brought before the court in deliberate bad faith.

C) Res Judicata

Res judicata does not prevent a direct attack (under Rule 60b) on a judgment in the court which rendered it. *Watts v. Pinckney* 752 F.2d 406, 410 (9th Cir. '85); *United States v. United States Fidelity Guaranty Co.* 84 L.Ed. 894 (1940). Res judicata, or claims preclusion refers to the preclusive effect of a judgment that forecloses religation of matters that were litigated or could have

been litigated in an earlier suit. "However, the same cause of action must be involved in both cases." *I.A. Durbin, Inc. v. Jefferson National Bank* 793 F.2d 1541, 1549 (11th Cir. '86); *Interoceanica Corporation v. Sound Pilots, Inc.* 107 F.3d 86, 90 (2d. Cir. '97). Also, there must have been "a final judgment on the merits..." *Federated Department Stores, Inc. v. Moitie* 452 US 394, 69 L.Ed. 2d 103, 108 (1981), citing *Commissioner v. Sunnen* 333 US 591, 92 L.Ed. 898 (1948). To determine whether the causes of action are the same, a key test is whether the "essential facts and issues in the second case were present in the first." *Herendeen v. Champion International Corporation* 525 F. 2d 130, 133 (2d. Cir. '75). In Austin's independent action, the cause of action is not the same because different facts are before the court. Furthermore, because essential information was kept from the jury by Hanover's fraud, the judgment was not rendered "on the merits."

D) Independent Actions - FRCP 60 b

The essential elements of such an action include a judgment which ought not, in equity and good conscience, to be enforced; fraud, accident or mistake which disadvantaged the injured party; the absence of fault or negligence by that party; and the absence of any adequate remedy at law. *National Surety Co. v. State Bank of Humboldt* 120 F. 593, 597 (8th Cir., 1903); *Bankers Mortgage Company v. United States* 423 F.2d 73, 79 (5th Cir., 1970). As stated by the court in the seminal *Marshall v. Holmes* 141 U.S. 870, 873 (1891):

> "any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." (underlining added)

The significance of the brief wording of Rule 60b's savings clause is by now well- known. The opinions on the subject both within and outside the Second Circuit do not support the dismissal of Austin's cause of action. For example, *Gleason v. Jandrucko* 860 F.2d 556, 560 (2d. Cir. '88) - "The aggrieved party must be able to show that there was no opportunity to have the ground now relied upon to set aside the judgment fully litigated in the original action." Also *George P. Reintjes Co. v. Riley Stoker Corporation* 71 F. 3d 44, 48 (1st Cir. '95) - "indispensable element of independent attack on judgment for fraud is that it prevented party from presenting his case."

As shown in Austin's complaint, "fraud upon the court," the second species of fraud that supports a valid independent action is also clearly present here. The mere existence of such fraud constitutes grounds for suspending a judgment. It is that species of fraud "which seriously affects the integrity of the normal process of adjudication." *Gleason* at 559. Therein the Second Circuit cites *Hazel-Atlas Glass Co. v. Hartford-Empire* 322 U.S. 238, 245-6 (1943).

> "In *Hazel-Atlas*, the Supreme Court set aside a twelve-year old judgment on account of new evidence of a "deliberately planned and carefully executed scheme to defraud not only the Patent Office but (a) Circuit Court of Appeals" in order to obtain a patent. 322 US at 245-46. The *Hazel-Atlas* Court explained that fraud on the court involves "far more than an injury to a single litigant" because it threatens the very integrity of the judiciary and the proper administration of justice. *Id.* at 246. Proof of a scheme to defraud together with the complicity of the offending party's lawyers in *Hazel-Atlas* was, in the Court's judgment, conclusive evidence of fraud on the court.

As stated in *Aoude v. Mobil Oil Corp.* 892 F.2d 1115, 1118-9 (1st Cir., 1989):

> "a fraud on the court occurs where it can be demonstrated clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter... where witness and attorney conspire to present perjured testimony... where party, with counsel's collusion, fabricates evidence."

Also see *In Re Intermagnetics of America* 926 F.2d 912, 916 (9th Cir. '91): "...includes both attempts to subvert the integrity of the court and fraud by an officer of the court"; *Weese v. Schukman* 98 F.3d 542, 552 (10 Cir.'96): "fabrication of evidence in which attorney is implicated."

The only limitation on an independent action for fraud between the parties is any relevant statute of limitations and laches, neither of which are applicable here. Where fraud upon the court is present, neither of these limitations or any other pertaining to equitable actions restrict the court's ability to vacate a judgment obtained through fraud practised upon it. Advisory Committee Notes, p. 282.

CONCLUSION

This Petition concerns a situation in which an insurer has employed its considerable resources and knowledge to perpetrate fraud on its own policyholder and void a valid insurance policy. The negative effects of such behavior on any homeowner attempting to recover from a catastropic fire should not be overlooked. In the process of trying to mispresent and conceal the true nature of its alleged evidence, Hanover has also knowingly defrauded a federal court of law. The negative consequences of a large, national insurance company willingly engaging in this type of behavior, however, go beyond any dispute with one policyholder and affect directly the nationwide institutions of home insurance and the federal judiciary on which this corporation depends in order to conduct its business.

The dispute also demonstrates how easily "experts" can manufacture false evidence in order to further the improper objectives of any litigant able to purchase their services. Such professionally engineered fraud is extremely difficult to cope with, and at best it can take many years. It is quite likely that if the mistake hadn't been made with the dating of the two, phoney lab tests, the truth about Hanover's alleged proof of arson probably never would have been known. The average policyholder is inclined to allow the insurer to handle on its own any investigation of a casualty. Unfortunately, this creates a situation such as this one where fraud can flourish.

The Supreme Court's Intervention is Appropriate and Essential

After six years of demanding litigation, this dispute constitutes an obvious injustice and can only encourage attornies, experts or anyone else inclined to fabricate evidence to be employed in court to thwart legitimate rights. Although Austin finally managed to uncover the scheme through which Hanover has deprived him of his land, possessions and the home he personally built over a ten-year period, he still has been unable to obtain any judicial relief. At this point, the independent action remains his only available means of redress. By classifying the action as frivolous, the Second Circuit has even placed him in jeopardy of being sanctioned for attempting to combat the fraud perpetrated against him. The regrettable implication is that even if such a serious fraud is discovered belatedly, a litigant may end up being sanctioned for trying to deal with it through an independent action. **Left in its current state, the case would indicate that the savings clause of Rule 60b will henceforth be applied unpredictably and cannot be relied upon in any sort of reasonably consistent way to remedy injustices, especially those caused by blatant fraud that previously eluded detection.**

As stated recently by the Supreme Court in *United States v. Beggerly* 524 US 38, 141 L.Ed. 2d 32, 40 (1998):

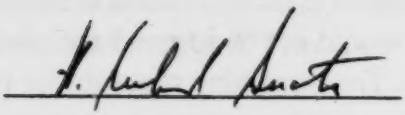
"Independent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of "injustices which, in certain instances, are deemed sufficiently gross to demand a departure" from rigid adherence to the doctrine of *res judicata*... an independent action should be available only to prevent a grave miscarriage of justice..."

There can be litttle doubt that this dispute constitutes the type of injustice referred to in the *Beggerly* opinion. The Supreme Court's intervention is appropriatedly sought so an equitable result can insue and also the Court's own standards regarding independent actions can be affirmed.

The relief sought includes vacating the unconscionable judgment that was obtained through the fraud that by now is very obvious. Entry of judgment against Hanover is also sought because fraudulent evidence was employed to prove the indispensable element of its defense. Without such evidence, Hanover in effect has no defense. (*Westchester Fire Insurance Company v. Deuso* 146 Vt. 424, 505 A.2d 666 ('85).

Furthermore, Petitioner contends that the fraud perpetrated on the court has deprived Hanover of all standing in court on this matter. It would be a contradiction indeed if a litigant such as Hanover, which has spent six years defrauding a federal district court, should be given additional opportunity to do the same thing all over again - in effect, the entire, unsavory matter merely being swept under the rug. And finally Austin also seeks reinstatement of his extra-contractural claims (bad faith, emotional duress, and punitive damages), all of which are provided for in the controlling substantive law. Currently these claims are now even more relevant to the dispute because of the facts that have become established regarding the bad faith and fraud that all along has characterized Hanover's conduct in connection with Austin's insurance claim.

Respectfully submitted,



H. Richard Austin
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APPENDIX A

(Enscribed order on side of Hanover's Motion to Dismiss in the District Court of Vermont)

Motion to dismiss is GRANTED. The matter is clearly barred by res judicata. It is further certified that any appeal taken in forma pauperis would not be in good faith because such appeal would be frivolous. The remaining requests for relief are DENIED without prejudice.

Dated at Brattleboro, Vermont this 3rd day of November 1999.

"s/ J. Garvan Murtha"
J. Garvan Murtha, Chief Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 4th day of May two thousand,

Present:

Hon. Thomas J. Meskill,
Hon. Jose A. Cabranes,
Hon. Robert A. Katzmann,
Circuit Judges,

Richard Austin,

Plaintiff-Appellant,

v. 99-9375

Hanover Insurance Company et al.,

Defendant-Appellees

Motions have been filed by appellant, pro se, for a "reduction of excessive bond for costs," and by appellees for a motion to dismiss based on appellant's failure to post the bond. Upon due consideration, it is ORDERED that the appellees' motion to dismiss is granted on the alternative basis that the appeal is frivolous for being barred by the doctrine of res judicata See *Pillay v. INS*, 45 F.3d 14, 17 (2d. Cir. 1995) (this court has the inherent authority to dismiss frivolous fee-paid appeals); *In re Teletronics Services, Inc.*, 762 F.2d 185, 190 (2. Cir. 1985) (discussing the doctrine of res judicata). Appellant's motion is denied as moot.

FOR THE COURT:
Roseann B. MacKechnie, Clerk
"s/ Lucille Carr"

APPENDIX C

UNITED STATES COURT OF APPEALS
for the Second Circuit
United States Court House
40 Foley Square
New York 10007

Roseann B. Mackechnie
Clerk

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 6th day of July two thousand.

Present:

Hon. Thomas J. Meskill,
Hon. Jose A. Cabranes,
Hon. Robert A. Katzmann,
CIRCUIT JUDGES,

H. Richard Austin,

Plaintiff- Appellant,

v. Docket No. 99-9375

Hanover Insurance Company and Massachusetts Bay Insurance Company, Defendants - Appellees

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A petition for panel rehearing having been filed herein by H. Richard Austin,

Upon consideration thereof, it is
Ordered that said petition be and it hereby is **DENIED.**

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk
"s/ Beth J. Meador"
Administrative Attorney